IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 04-20017-DV**
	)	
RANDE LAZAR, M.D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS,	)	
Defendant.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S OMNIBUS DISCOVERY MOTION (Doc. No. 72)

Before the court is the omnibus discovery motion of the defendant, Rande H. Lazar, filed August 27, 2004, asking the court to order the government to do the following: (1) identify all documents it intends to use in its case in chief; (2) identify all co-schemers and co-conspirators; (3) identify all statements of co-conspirators and all other persons whose statements the government intends to offer at trial against the defendant as his own; (4) make early disclosures of all Rule 404(b) evidence; (5) immediately disclose all *Jencks* material; (6) provide a witness list to the defense; (7) disclose all electronic surveillance, regardless of media, of Dr. Lazar or his attorneys, including all communications between or among Dr. Lazar or his attorneys; and (8) preserve all agents' rough notes, and draft reports and affidavits. This motion

was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is granted in part and denied in part.

1. Request for Identification of Case-in-Chief Documents

Lazar moves that the government be ordered to immediately identify all its case-in-chief documents. Because the government has produced approximately 100,000 pages of documents, Lazar contends that identifying which documents the government intends to use in its case-in-chief is equivalent to searching for a needle in a haystack. Citing no Sixth Circuit precedent, Lazar argues that Rule 16(a)(1) of the Federal Rules of Criminal Procedure and fundamental fairness dictate that his request should be granted.

The government contends that Rule 16 only requires the government to permit the defendant "to inspect and copy . . . documents . . . if the item is within the government's possession . . . and the government intends to use the item in its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1). According to the government, the rule does not require that it provide a list of all the documents it intends to use at trial; rather, it only requires that the defendant be allowed to inspect and copy the documents. The government has not cited any relevant Sixth Circuit authority to support its contention that it should not be required to identify its case-in-chief documents.

Given the voluminous amount of documents in this case, the government's analysis of Rule 16 begs the question. In order to allow the defendant a meaningful opportunity to copy and inspect the items the government intends to use in its case-in-chief, it only seems fair that the government identify which documents it intends to use. There is no reason why Lazar should have to wade through a mire of documents which will not be used by the government in its case-in-chief. It appears to the court that this will be a lengthy, document-intensive trial and therefore there is a need to identify which documents the government will rely on in its case-in-chief. Accordingly, the government is ordered to identify all documents in which it intends to use in its case-in-chief at least sixty (60) days before trial.

2. Request for Identification of all Co-Schemers and Co-Conspirators

Lazar moves that the government be required to disclose the identity of all unindicted co-schemers and co-conspirators. Despite the fact that Rule 16(a) does not require disclosure, Lazar argues that this information will allow the defense to organize its review of the 100,000 pages of documents produced by the government in this case which will allow him to avoid any unnecessary surprise at trial.

The government contends that Lazar's request is nothing more

than an attempt to secure a witness list and that due process does not require the government to reveal the names of its witnesses before trial. Lazar states, however, that he is not invoking due process or claiming any entitlement to such information; rather, he simply argues that the circumstances of this case justify granting his request.

The court disagrees with Lazar's contention. The court's reasoning is quite simple. The indictment does not charge Lazar with a conspiracy. Instead, the superseding indictment contains 120 counts charging Lazar individually with devising and executing a scheme to defraud and obtain money from health care benefit programs. Therefore, there are no co-conspirators to be identified. Similarly, there are no co-schemers to be identified, and if there were, Lazar has provided no legal authority that would bind the court to grant his request. Lazar's request for disclosure of co-schemers and co-conspirators is denied as moot.

3. <u>Request for Identification of all Statements of Co-Conspirators and Other Persons</u>

Lazar moves that the government be required to identify all statements of co-conspirators or other persons that constitute statements of Dr. Lazar himself pursuant to Fed. R. Evid. 801(d)(2) which the government intends to offer at trial. The government responds by claiming that it is unable to determine what Lazar is

actually requesting.

Again, Lazar has requested statements that do not exist. There are no co-conspirators in this case because there is no charge of conspiracy pending. Therefore, Lazar's request for statements made by co-conspirators is denied as moot. Lazar has cited no authority which suggests that he is entitled to statements of "other persons" that constitute statements of his own. As such, this request is also denied.

4. <u>Request for Early Disclosure of All Rule 404(b) Evidence</u>

Lazar moves for the early disclosure of all evidence of any alleged other crimes, wrongs, or acts which might be admissible under Fed. R. Evid. 404(b). Because of the potential of prejudicial error in allowing improper 404(b) evidence, Lazar contends that by granting his request, both parties will have ample opportunity to prepare and respond to any motion in limine that Lazar plans to file if the government seeks to offer such evidence. The government does not object to this request, but asks the court to allow it to turn over such evidence five (5) days prior to trial.

After considering the basis for Lazar's motion, the court finds that such evidence should be turned over at least sixty (60) days prior to trial. Because Lazar has made a request for 404(b) evidence, the government has "to comply with the notice requirement

of Rule 404(b) whenever it discovers information that meets the previous request." *United States v. Barnes*, 49 F.3d 1144 (6th Cir. 1995.) This includes information learned after the date set by the court for complying with the initial request.

5. Request for Early Disclosure of *Jencks* Material

Lazar moves that the government immediately produce all *Jencks* material. Due to the complexity of this case, Lazar argues that it is only fair that his request be granted so that he will have sufficient time to investigate the witnesses' allegations, to develop relevant and contrary evidence where necessary, and to avoid surprise at trial.

Lazar contends that where there is no potential for threats or intimidation of witnesses by the defendant, then the court has the inherent authority to order early *Jencks* disclosures. Lazar cites *United States v. Narciso*, 446 F.Supp. 252, 270 (E.D. Mich. 1977), for the proposition that courts have inherent power to allow early *Jencks* disclosures not limited by statute to insure due process of law, that effective assistance of counsel is provided, and that criminal trials are fair and efficient. The court in *Narciso* stated, however, that this inherent "power has traditionally been used sparingly." *Id*. The *Narciso* case, as the court noted, presented a "truly extraordinary situation" because of the complexity of the issues to be presented at trial and the number of

witnesses who were to be called at trial. *Id*. The court concluded that early disclosure of *Jencks* material was necessary because "an overtly strict adherence to the *Jencks* Act raise[d] potential deprivations of due process and effective assistance of counsel." *Id*.

Lazar has attempted to analogize his situation to the one in *Narciso*. Lazar asserts that this too is a complex case with complicated allegations in an area of law with numerous regulations. He points out that there will be a number of witnesses, including hundreds of patients and many representatives from the twenty-five plus insurers listed in the indictment. In addition, defense counsel represents that Lazar will not intimidate or make threats to the government's witnesses if they were to become known.

The government agrees with Lazar that the underlying function of *Jencks* is to protect potential witnesses from threats of harm, but argues that even where threats are unlikely, the court is not allowed to ignore the mandates of the statute by allowing early disclosure. The *Jencks* Act, codified as 18 U.S.C. § 3500(a) states: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than by the defendant) to an agent of the Government shall

be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case*." (emphasis added). In accordance with this rule, the Sixth Circuit, along with the other circuits, has held that the government has no obligation to disclose, and the trial court has no discretion to compel disclosure of *Jencks* Act material before a witness testifies. *United States v. Algie*, 667 F.2d 569 (6th Cir. 1982); *U.S v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979); *U.S. v. Spagnuolo*, 515 F.2d 818 (9th Cir. 1975); *U.S. v. Feinberg*, 502 F.2d 1180 (7th Cir. 1974); *U.S. v. Gottlieb*, 493 F.2d 987 (2nd Cir. 1974).

While the court is sympathetic to Lazar's argument, the *Narciso* case appears to be limited to the extraordinary circumstances present in that particular case. The court is unable to locate and Lazar has not provided any other case besides *Narciso* that supports his contention. Furthermore, Lazar has failed to sufficiently identify how early disclosure in his case will protect the interest of due process, effective assistance of counsel, and the fair and efficient disposition of this criminal trial. Thus, in accordance with the weight of authority, including that of the Sixth Circuit, Lazar's motion for early disclosure of *Jencks* material is denied.

It should be noted that this decision is not to be construed

as disapproving of the practice of voluntarily turning over *Jencks* material before the statutory requirement. In fact, this court encourages the government to disclose *Jencks* material early where feasible.

6. Request for Government's Witness List

In his motion, Lazar requests the immediate production of a list of names and addresses of all witnesses the government intends to call at trial. Lazar concedes that the United States Code or the Federal Rules of Criminal Procedure do not explicitly allow him pre-trial access to the government's witness list. However, he contends that it is in the court's general discretion to compel the government to produce a witness list.

Responding to Lazar's argument, the government cites several cases which stand for the proposition that a defendant is not *entitled* to or has *no right* to a list of the government's witnesses. The government is correct in its analysis that there is no absolute right to the government's witness list, but what it has failed to address in its response is the discretion that the court has to compel production.

It is well established that a court, in its discretion, may order the government to produce a witness list. *U.S. v. Cannone,* 528 F.2d 296 (2nd Cir. 1975); *U.S v. Jackson*, 508 F.2d 1001, 1005-1008 (7th Cir 1975); *U.S. v. Murphy*, 480 F.2d 256, 259 (1st Cir.

1973); *U.S. v. Jordon*, 466 F.2d 99 (4th Cir. 1972). As noted by the Second Circuit in *United States v. Cannone*, concealment of witness identities is necessary in some cases. This is particularly true in cases charging crimes of violence or in cases where witnesses are likely to be threatened if the they proceed to testify at trial. In light of the fact that defense counsel has represented to the court that Lazar will not seek to intimidate witnesses nor has he done so since the beginning of the government's investigation, the court finds that this case is not one of those cases which require concealment of the identify of witnesses. Furthermore, the government has offered no legitimate grounds for concealing the names of its witnesses. Accordingly, the government is ordered to produce the names and addresses of its witness at least sixty day (60) before trial.

7. <u>Request for Disclosure of Electronic Discovery</u>

Dr. Lazar moves that the government disclose all electronic surveillance of himself or his attorneys, including all communications between him and his attorneys. The government responded by stating that there is none to disclose.

Lazar has since filed a separate motion to clarify what the government means by "There is none to disclose," and the court has granted the motion. Thus, at this time, this motion to compel the government to disclose electronic surveillance is denied as moot

without prejudice.

8. Request for Preservation of Agents' Rough Notes, and Draft Reports and Affidavits

Lazar's final request is that the government be ordered to preserve all of its agents' rough notes, and draft reports and affidavits. The government responds by stating that it has no obligation under Sixth Circuit law to provide such material. This response overlooks Lazar's true request. Lazar does not ask that the government provide him with these documents, only that they be *preserved*. The court sees no harm in requiring the government to preserve the notes and the government has not objected to Lazar's request for preservation. The government is therefore ordered to preserve all agents' rough notes, and draft reports and affidavits.

IT IS SO ORDERED this 2nd day of December, 2005.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE